No. 12020

In the United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody & Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, TAX COLLECTOR FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,

Appellee.

Appellee's Brief

HAROLD W. KENNEDY,
County Counsel,
and
ANDREW O. PORTER,
Deputy County Counsel,
1100 Hall of Records,
Los Angeles 12, California,
Attorneys for Appellee.

TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

Cases

Codes, etc.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody & Co., Inc., Bankrupt, *Appellant,* vs. H. L. BYRAM, TAX COLLECTOR FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, *Appellee.*	No. 12020

Appellee's Brief

Statement of the Case

Appellee has no objection to appellant's statement of the pleadings and statement of the case as set forth in appellant's opening brief.

Summary of the Argument

It is respectfully submitted that the order of the Honorable Wm. C. Mathes, United States District Judge, ordering the referee to allow the appellee tax collector's claim in full as an expense of administration, is correct and should be affirmed, for the following reasons:

1. A tax claim may not be reduced under the first proviso of section 64a(4) of the Bankruptcy Act (11 U. S. C. A. Sec. 104a(4)) unless the *tax* exceeds the *value* of the bankrupt's interest in the property. Here the "property" is one lot of merchandise, part of which was later abandoned to a mortgagee, but the remainder of which came into the bankrupt estate and was sold for more than the amount of the tax.

2. Abandonment does not relate back so as to avoid a personal liability for taxes accrued while conducting the business by order of court. The property was assessed as one unit at the request of the trustee. The liability attached as a personal obligation. Five months later the order of abandonment was made. A trustee or debtor in possession must pay current taxes as they accrue; nothing in the act relieves him of this obligation.

3. The bankruptcy court is without power to redetermine an assessment, or to arbitrarily divide it, after its quasi-judicial determination pursuant to California law. Dividing an assessment is not determining the amount or legality of a tax under the second proviso of section 64a(4) of the Bankruptcy Act (11 U. S. C. A. sec. 104a(4)). It is redetermining the assessment. This the court may not do under *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. The California procedure complies fully with the requirements of this case.

Argument

I.

A Tax Claim May Not Be Reduced Under Section 64a(4) Bankruptcy Act, Unless the Tax Exceeds the Value of the Bankrupt's Interest in the Property. There Is No Authority for Dividing the Assessment Where Part of the Property Is Lost or Abandoned.

Section 64a(4) of the Bankruptcy Act (60 Stats. 330, 11 U. S. C. A. sec. 104a(4), insofar as material here, reads as follows:

> "SEC. 64. DEBTS WHICH HAVE PRIORITY—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: . . . "

The Supreme Court has applied the provisos of sec. 64a(4) to tax claims which are entitled to first priority as expenses of administration under sec. 62(a) and sec. 64a(1) (11 U. S. C. A. secs. 102a and 104a(1)). (See: *Arkansas Corporation Commission v. Thompson* (1940), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.)

In applying the first proviso of sec. 64a(4), quoted above, the Circuit Court of Appeals for the Fifth Circuit said in *Glass v. Phillips* (1943), 139 F. 2nd 1016, at 1017.:

> "The referee and the court below misconceived the language and purpose of Sec. 64, sub. a. The language, 'Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court,' does not provide that no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the tax yielded by an assessment of the value of the interest of the bankrupt estate, but only that the court shall not make an order for the payment of taxes in excess of the value of the interest of any property of the bankrupt estate. If the bankrupt has an interest in property but is not the owner of the whole of such property, no order shall be made to pay the entire tax against the property in excess of the value of the interest of the bankrupt in such property. The language of the statute is not susceptible of any other interpretation."

In that case only 20% of a stock of merchandise on which an assessment had been made came into the hands of the trustee, but the value of the 20% exceeded the amount of the tax. It was therefore held that the bankrupt estate must pay the entire tax, not merely its proportionate part thereof.

See, to the same effect: *In re Ingersoll Co.* (1945) (C. C. A. 10th), 148 F. 2d 282, at 284, where part of the land included in an assessment was sold before the intervention of bankruptcy and did not come into the custody of the trustee.

In the case at bar, the portion of the merchandise assessed which did come into the possession of the trustee was sold for an amount greater than the amount of the total claim filed by the tax collector, appellee, herein. (Finding 5 of the referee, Tr., p. 32.) It is submitted that the tax claim was therefore properly allowed in full by the Bankruptcy Court.

II.

Abandonment Does Not Relate Back So as to Avoid a Personal Liability for Taxes Accrued While Conducting the Business by Order of Court.

Property taxes in California accrue on the first Monday in March. (Secs. 1 and 8, Art. XIII, Cal. Const., sec. 405 Cal. Rev. & Tax. Code.) Unsecured personal property taxes are due and payable on the lien date, that is, on the first Monday in March. (Sec. 2901 Rev. & Tax. Code.) At that time the debtor (now the bankrupt herein) was in possession carrying on its business by order of court. (Tr., p. 14.) Personal property may be assessed to the owner or person in possession on tax day. (*RCA Photophone, Inc. v. Huffman* (1935), 5 C. A. (2d) 401, 42 Pac. (2d) 1059; *County of San Diego v. Davis* (1934), 1 Cal. (2d) 145,

33 Pac. (2d) 827.) It was thus properly assessed to the debtor.

Taxes accruing during an attempted reorganization must be paid as expenses of administration in subsequent bankruptcy liquidation. *U. S. v. Killoren* (1941) (C. C. A. 8th), 119 F. 2d 364.

The trustee is estopped to deny that the debtor (now the bankrupt herein) was the owner or person in possession on tax day. (See *People v. Stockton & C. R. R. Co.* (1874), 49 Cal. 414; *Lake County v. Mining Co.* (1885), 68 Cal. 14, 8 Pac. 593.)

The trustee herein on April 4, 1947, filed a verified statement with the tax assessor showing the property owned, possessed or controlled by the debtor on tax day. Such a statement is required by section 8, Art. XIII California Constitution and section 441 Revenue & Taxation Code. In the statement he listed as one item:

> "Mdse. at 5300 S. San Pedro St. $126950. Cotton-ticking-mattresses-etc." (Finding 4, Tr., p. 32.)

This included both the merchandise in the factory and that subject to warehouse receipts in the Hazlett Warehouse, (located in the same building). The tax assessor followed the taxpayer's statement and made one assessment of merchandise at 5300 S. San Pedro Street at a value of $126,950.

The taxes in question were unsecured. (Tr., p. 26.) The assessee of an unsecured personal property tax is personally liable for the tax.

Revenue and Taxation Code, Sec. 3003 and 3004.

See cases under prior but similar statutes:

San Gabriel etc. Co. v. Witmer Bros. Co. (1892), 96 Cal. 623 at 636, 29 Pac. 500, 502, 31 Pac. 588;

City of Los Angeles v. Glassell (1906), 4 Cal. App. 43, 87 Pac. 241;

Miller & Lux v. Sparkman (1932), 128 Cal. App. 449, at 453-454, 17 P. (2) 772.

A debtor or trustee in possession must pay current taxes as they accrue.

Schwarts v. Hammer, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060;

Boteler v. Ingels, 308 U. S. 57, 60 S. Ct. 29, 84 L. Ed. 78.

In the case of *In re Humeston* (1936) (C. C. A. 2nd), 83 F. 2d 187, the trustee took possession of real property belonging to the bankrupt, collected the rents but failed to pay the taxes as they fell due. Then he attempted to abandon the property to the mortgagees, and the Court said (at p. 189):

> "However, they were entitled to some relief. Such taxes as fell due during the period of the trustee's occupation were part of the expenses of that occupation and should be borne by the estate. Michigan v. Michigan Trust Co., 286 U. S. 334, 52

S. Ct. 512, 76 L. Ed. 1136; MacGregor v. Johnson-Cowdin-Emmerich, Inc., 39 F. (2d) 574, 576 (C. C. A. 2); Central Vermont R. Co. v. Marsch, 59 F. (2d) 59 (C. C. A. 1); Prudential Ins. Co. v. Liberdar Holding Corporation, supra, 74 F. (2d) 50. . . . When on the other hand the mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable between November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and penalties accumulated upon them. It was the trustee's duty to pay them when they fell due, and the estate must suffer from his failure. The first order will therefore be modified to conform to this disposition."

See:

Robinson v. Dickey (1929) (C. C. A. 3rd), 36 F. (2d) 147, cert. denied 281 U. S. 750 (1930).

Here neither the debtor nor the trustee paid the tax, due on the first Monday in March. The order of abandonment was not made until August 20, 1947, (Tr., p. 28) five months later.

It is respectfully submitted that under these circumstances no provision of the Bankruptcy Act relieves the bankrupt estate of an obligation once accrued to pay taxes.

III.

The Bankruptcy Court Is Without Power to Redetermine an Assessment, or to Arbitrarily Divide It, After Its Quasi-Judicial Determination Pursuant to California Law.

Nothing in California law permits a taxpayer to divide a personal property assessment between various items included in a single assessment. There is however specific statutory authority under certain circumstances for the division of an assessment on real property. (Secs. 2803-2808, Rev. & Tax. Code.) The mode is prescribed, requiring full payment of the tax on personal property and possessory interests, the filing of an affidavit with the officer having custody of the tax roll and the payment of a fee. The fact that there is specific authority regarding only real property negatives the existence of any such authority as to personal property.

Nothing in California law permits a taxpayer to pay part of a personal property tax without paying the entire tax. Again there is specific authority regarding real property only. (Secs. 2800-2802, Rev. & Tax. Code.)

Thus if a bankruptcy court or its referee has power to divide an assessment or to pay part of a tax on personal property, some authority therefor must be found in the Bankruptcy Act. It is respectfully submitted that there is no such authority. The only possible applicable provisions are the two provisos of sec.

64a(4). (11 U. S. C. A. sec. 104a(4).) The first proviso has been discussed under point I, *supra.*

The second proviso of section 64a(4) reads as follows:

> " . . . *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . . "

Dividing an assessment is not determining the amount or legality of a tax. It is redetermining the assessed valuation and proportioning the tax accordingly. This the bankruptcy court has no power to do.

> *Arkansas Corporation Commission v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244;
>
> *Baumann v. Sheehan* (1944) (C. C. A. 8th), 140 F. 2d 747, 751;
>
> *Commonwealth of Pennsylvania v. Aylward* (1946) (C. C. A. 8th), 154 F. 2d 714, 717;
>
> *In re Ingersoll Co.* (1945) (C. C. A. 10th) 148 F. 2d 282, 284.

In *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504, the Supreme Court reaffirmed its holding in the Arkansas case (329 U. S. at p. 578) and listed a number of things that the court was authorized to do regarding tax claims. (329 U. S. at pp. 579-582.) The power to redetermine or to divide an assessed valuation is not one of them.

The California procedure complies with the requirements of the Arkansas case. (See sections 405,

441, 454, 616, 617, 1601, 1614, 1646 Rev. & Tax. Code; *Siebe v. Superior Ct.* (1896), 114 Cal. 551, 552, 46 Pac. 456; *Hagar v. Reclamation Dist. No. 108* (1884), 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569; *People v. Goldtree* (1872), 44 Cal. 323; *L. A. etc. Co. v. County of L. A.* (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277; *Universal Consolidated Oil Co. v. Byram* (1944), 25 Cal. (2d) 353, 362, 153 Pac. (2d) 746.) The finality of the quasi-judicial determination of the county board of equalization is not affected by the failure of the taxpayer to avail himself of his right to review. (*Luce v. City of San Diego* (1926), 198 Cal. 405, 245 Pac. 196; *Dawson v. County of L. A.* (1940), 15 Cal. (2d) 77, 81, 98 P. (2d) 495. See *Guardianship of Jacobson* (1947), 30 Cal. (2d) 326, 334, 182 P. (2d) 545; *Fitzgerald v. Herzer* (1947), 78 Cal. App. (2d) 127, 131-132, 177 P. (2d) 364; Res., Judgments, sec. 68, p. 294, 302.)

Conclusion

It is submitted that the order of the United States District Judge is correct and should be affirmed.

Respectfully submitted,
HAROLD W. KENNEDY,
County Counsel,
and
ANDREW O. PORTER,
Deputy County Counsel,
Attorneys for Appellee.